



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Johns

v

MyOnline School Ltd

Heard at: Reading Employment Tribunal

On: 12 August 2022

Before: Employment Judge Forde

Appearances

For the Claimant: In person

For the Respondent: Mr Dyson, Counsel

JUDGMENT

1. The claimant's claims of breach of contract and unlawful deductions of wages are not well founded and are dismissed.

REASONS

1. By way of a claim form received on 21 November 2021 the claimant makes claims of arrears of pay and in respect of holiday pay and notice pay.
2. The claimant explains that his employment with the respondent commenced on 19 November 2019. However, on 19 March 2021 he attended a meeting with Mrs Elspeth Briscoe, the respondent's founder and CEO together with Mr Stuart Dawson, the respondent's Finance Director.
3. It is not in dispute between the parties that the claimant was informed orally during the course of his meeting that his employment was terminating by reason of redundancy that day. In other words, the claimant's employment was to terminate with immediate effect and he was to be paid in lieu of his three months' notice which he was entitled to receive by virtue of his contract of employment or direct service agreement.
4. Immediately following the meeting on the same day, the claimant was sent a letter by email confirming to him that his last day at work would be 19 March 2021 and that he would not be required to attend the office. In that letter it was explained that he would be paid in lieu of his three months' notice. The

letter in question was sent to the claimant by email on 19 March 2021 at 10.43am by Mrs Briscoe.

5. There is a dispute between the parties as to what happened next in terms of the claimant's engagement with the respondent. It is the claimant's case that he worked on 20 and 21 March 2021 and he relies upon a number of emails between him and Mrs Briscoe. The respondent, through Mrs Briscoe and in submissions, contends that the claimant did not work on these dates; instead, it was the case that the claimant was engaging in handover duties and that he was doing so in accordance with his agreement that he would assist the respondent in handing over work that he was undertaking on the respondent's behalf as its employee. Further, the respondent contends that the claimant did not indicate anything other than his clear intention to accept that his employment had lawfully come to an end.
6. However, this claim arises through the claimant's assertion that his contract of employment provides by way of section 24(1) that a notice to the parties of that service agreement or contract be provided in writing and it should not be accepted by post (section 24). In other words, it was the claimant's case that the email sent to the claimant on 19 March 2021 at 10.43am constituted invalid provision of notice.
7. The claimant contends (and his claim is based) upon his belief that notice was invalidly served by the respondent, a discrepancy which was cured by the service of valid notice of termination on 31 August 2021 when the claimant received some documents held by the respondent which were being provided to him pursuant to the claimant's subject access data request submitted some time earlier. The claimant claims by extension that due to the discrepancy I have just described, he is entitled to claim arrears of pay from 20 March 2021 to 31 August 2021, holiday pay for the same period and three months' notice pay running from 31 August 2021. Essentially, the claimant asserts that the crux of his claim is that is whether or not the notice was validly serve on 19 March 2021.
8. The respondent disputes the claim. It says a number of things. First of all, through its barrister Mr Dyson, it contends that although the claimant was sent notice of termination via email, clause 24(1) of the claimants contract of employment requires all such notices to be sent in writing and holds that email service is not valid. Notwithstanding, the respondent ,maintains its position that the effective date of termination was 19 March 2021
9. In answer to the question as to whether or not the contract was terminated on 19 March 2021, the respondent postulates that in accordance with section 24 of the contract of employment, the respondent was in breach of the contract on 19 March 2021 by sending the letter it did to the claimant. However, it says by conduct, failing to serve the notice properly was treated as a repudiatory breach by the claimant and in the face of that breach the claimant had two options, namely he could affirm the contract or accept the breach and treat the contract as being terminated. By way of conduct, the respondent asserts that the claimant accepted the breach as a repudiatory breach and treated the contract as having been terminated. Further, the

respondent asserts that the claimant's actions on and after 19 March 2021 were inconsistent with his case that he had not considered that his employment had not been validly terminated and the respondent points to the fact that the claimant did not attend work or attempt to take any work on after this time and that this clearly demonstrated that he wished to terminate his contract of employment.

10. The respondent goes further and says that the claimant's conduct post 19 March 2021 was clear and unequivocal and wholly inconsistent with the contention that the contract had not been terminated.
11. At the end of submissions, Mr Dyson suggested as an alternative by way of estoppel and manifested by the claimant's failure to assist on service by post in the period following 19 March 2021. Mr Dyson made the point that the claimant relied on the words "formal notification" during the course of the meeting on 19 March 2021 as a way of expressing his desire that the respondent should comply with the terms of the contract and specifically the contracts notice provisions. Mr Dyson contended that the words and formal notification fall well short of a request for the letter to be sent by post in accordance with the terms of the contract. Mr Dyson says that this was evidence by the claimant's failure to make contact with the respondent and seek work and that accordingly it would be inequitable to allow the claimant to have a remedy in circumstances where he has waived his right to request a notice and therefore the claim should not be allowed.

Evidence

12. Before me was a bundle stretching over 102 pages containing amongst other things the claimant's contract of employment, the email correspondence between the claimant and Mrs Briscoe and some other emails including an email on 28 June 2021 when the claimant granted access to Alex Knott of the respondent to a document following a request made by way of a shared Google drive.
13. The tribunal also had the benefit of a meeting note prepared by Mr Stuart Dawson and sent by way of email to Mrs Briscoe dated 20 March 2021. The note explains that it had been decided that the Head of Marketing role was being made redundant with immediate effect, that it was appreciated that the claimant had a three month notice pay which would be paid as normal, the claimant had a right of appeal and, that he would receive a letter confirming the matters outlined in the meeting. He was thanked for his hard work during his time with the respondent. The claimant is recorded as asking if there was a list of handover tasks Mrs Briscoe wanted him to complete. He confirmed that he was not holding any company property. Mrs Briscoe thanked the claimant for his offer, explained that she did not think that any assistance was required of him but would check. The meeting note ends with the claimant thanking Mrs Briscoe for the opportunity of working for the respondent and wished her good luck for the future.

14. The claimant's note, in manuscript is shorter and in less detail than that of Mr Dawson's. It could be located at page 101 of the bundle. What it says is as follows:-

“ - Formal notification. Yes, will follow.
- Would you like me to work my notice period or go on gardening leave? GL
- Action list.
- Share files.
- Payment schedule
- Monthly”

15. The claimant gave evidence first. He had prepared a short witness statement which he outlined his case. In short, the claimant's position was that he had requested during the course of the meeting that took place on 19 March 2021 that he required formal notification of his dismissal. By the words “formal notification” the claimant was resolute that by this he meant provision of notice in accordance with section 24 of his service agreement. The claimant did not accept that the email correspondence that he had with Mrs Briscoe following 19 March was merely of a handover nature. He describes the questions asked of him and his subsequent responses as “calling upon his time” or in other words, requiring him to work. Further, the claimant made the point that emails that he received in respect of providing access to a shared Google drive in June 2021 supported his view that he remained employed albeit without access to work software or providing any work whatsoever by the respondent, a position that the claimant accepted.

16. In response to the question as to how it could be that the claimant could say that he remained an employee albeit not working between the period 19 March 2021 to 31 August 2021, the claimant expressed the view that he remained at home which was his place of work and had been throughout much of the pandemic and that he was easily contactable should the respondent want him to have provided him with work. He denied that his conduct following 19 March 2021 was consistent with that of someone whose employment had terminated.

17. Mrs Briscoe gave evidence next. Understandably, she gave a different picture of how matters unfolded following the meeting on 19 March 2021. She explained that the emails that she had exchanged with the claimant were in fact emails of a handover nature. An email exchange between the claimant and Mrs Briscoe was relied upon in support of the point and is set out below:

“Alun,

Please can you tell us if the Gardener's World emails were done and are going ahead/have gone ahead & please will you hand anything over to Jemima to do on this front.

Many thanks

Elsbeth: Sent 21st March 2021 at 07:13 hours”

18. And the claimant's response sent at 21 March 2021 at 08:33 hours:

“Hi Elspeth, All the Gardener's World stuff is booked and effectively now sitting with Tim for creative. He knows what he is doing and has all the deadlines etc. He's got Steve's support for any design issues and the different formats are already templated out so its pretty much in hand. For any non-design issues, just let Tim know to refer them to Jemima rather than me. She has already been involved in the process of selecting the courses to feature so knows her way around the sheets etc.....”

19. The claimant took Mrs Briscoe to her witness statement and paragraph 29 in which Mrs Briscoe states that the claimant did not attend work or show a willingness to attend work. When asked about this Mrs Briscoe made the point that the claimant showed no inclination to work for the respondent after 19 March 2021 and made no attempt to contact her to seek work despite having her mobile number. In response, the claimant stated that her action prevented him from rendering work a point that Mrs Briscoe did not accept.
20. The cross examination moved on to explore what was discussed during the course of the meeting on 19 March and Mrs Briscoe remained of the view that once notice of termination had been communicated to the claimant he had agreed to provide ongoing support in the way of handover and was clear that the claimant had accepted verbal notification of the termination of his employment.
21. Mr Dawson gave evidence after Mrs Briscoe and his evidence was more or less in alignment with that of Mrs Briscoe in relation to the key issues, namely what was discussed during the course of the meeting on 19 March 2021 and what the respondent describes as the claimant's acceptance of the fact that his employment had come to an end at that time.

Fact findings

22. I find that during the course of the meeting which took place on 19 March 2021, the claimant was informed that he was being made redundant with immediate effect and that he would be paid in instalments the money he was due to be paid from his notice period. I find that Mrs Briscoe explained to the claimant that he had a right to appeal his dismissal and that he would receive a letter confirming the matters outlined in the meeting. On the balance of probabilities, I do not find the claimant requested formal notification in the way that he asserts or at all. I base my findings on the evidence that was presented to me and heard before me and have reached these findings on the balance of probabilities. I go further, and say that it would be perverse to have come to any other finding given the overwhelming nature of the evidence which supports the respondent's case.
23. I find that the contact between the claimant and Mrs Briscoe on 20 and 21 March was consistent with the claimant's agreement that he would undertake handover tasks if asked. I do not find that the performance of the handover tasks identified amount to work under the claimant's contract of employment. Rather, I find that what the claimant did at this time was

entirely consistent with the agreement describes by Mrs Briscoe. For these reasons alone, the claims must fail.

24. I have already stated that the respondent conceded that it was in breach of contract by Mrs Briscoe sending to the claimant the letter that she did on 19 March 2021. As I have already observed, section 24(4) of the agreement provides as follows:

“A notice required to be given under this agreement shall not be validly given if sent by email.”

25. However, I am of the view that the respondent was entitled to terminate the claimant’s employment in a manner of its choosing pursuant to section 14(1) of the claimant’s contract of employment which provides that the respondent may in its sole and absolute discretion terminate the claimant’s employment at any time with immediate effect by notifying the claimant that it was exercising its right under clause 14(1). However, this was a not a case pursued by the Respondent and cannot form part of my findings.
26. Further and alternatively, I find that the claimant accepted that his employment had ended on 19 March 2021 and communicated acceptance of this fact by undertaking relevant handover duties and not attending work as instructed. The claimant did not raise an issue in relation to the termination of his employment or the failure of the respondent to provide him with work or engage within its business. In other words, the claimant’s conduct was entirely consistent of someone who had accepted the respondent’s repudiatory breach regards notice and was content to allow his employment to come to an end.
27. In other words, the claimant’s conduct was entirely consistent with someone who had properly accepted that his employment had ended on 19 March 2021. Consequently, I find it very surprising that the claimant can now contend that he was entitled to pursue his claim against the respondent in circumstances where it was plain and obvious that he was not legally entitled to do so. It follows that the claim does not succeed and is dismissed.

Employment Judge Forde

Date: 26 September 2022

Sent to the parties on: 17 October 2022

For the Tribunal Office